Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1537

M.W. ZACK METAL COMPANY,
Petitioner,

v.

INTERNATIONAL NAVIGATION CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT FOR SUMMARY REVERSAL OR PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
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NO._____

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

JURISDICTION

This Court lacks jurisdiction to consider Zack's Petition, no case or controversy now existing between the parties. The matter is moot. Article III Constitution.

QUESTION PRESENTED

Whether the District Court and the United States Court of Appeals for the Fourth Circuit acted without any proper basis when they declined to enforce the money judgment of a German Court in

favor of M. W. Zack Metal Company and instead ordered its suit dismissed.

STATEMENT OF THE CASE

In 1960 Contam Linie Jansen & Co. chartered (Gencon Charter) the vessel SEVERN RIVER then owned by International Navigation Corporation (hereinafter I.N.C.) for a single voyage from Antwerp to New York. Charterer solicited the cargo and issued its own bills of lading. A bill of lading issued to cover certain steel products loaded on board was purchased by M. W. Zack Metal Company (hereinafter Zack). When that steel outturned at New York, Zack alleged it was in damaged condition.

Zack filed a cargo suit in 1961 in a court in Germany, naming as parties defendant the charterer, charterer's partners, and I.N.C., and seeking $79,723.74 damages. It relied upon bill of lading #35 to support its claim that the steel was damaged while on board the SEVERN RIVER during the 1960 voyage.

Three lower court German judgments followed.

The first on May 9/10, 1966, noted that Zack had sought to impose personal liability upon charterer, charterer's partners, and upon I.N.C. And that Zack had also sought to require I.N.C. to agree to execution proceedings of its vessel SEVERN RIVER and subsidiarily to grant the pertinent right to Zack. The German Court granted a personal judgment against charterer and charterer's partners, ruled that the legal dispute with I.N.C. was not yet ready for decision.

The second judgment on June 15, 1971, fixed Zack's damages at $64,018.83 plus interest.

The third judgment on December 7, 1971, again noted that Zack had proposed to convict I.N.C. as a collective debtor with charterer and charterer's partners to pay the money judgment and also to have I.N.C. suffer because of that sum the distraint regarding the SEVERN RIVER. The German Court rejected Zack's payment claim against I.N.C., held that only the sufferance claim against I.N.C. (to suffer the distraint of the SEVERN RIVER) was justified. That Court further declared the sufferance claim judgment enforceable pending appeal against a security payment by Zack of DM (German Marks) 180,000.

None of the parties being satisfied with these judgments, all appealed to the Hanseatic Provincial Appeal Court of Hamburg. Each sought again the relief originally asked for in the lower German Court.

Charterer and its partners provided security for the judgment while awaiting the outcome of the German appeal.

On April 14, 1972, while the German appeal was pending, Zack sought to enforce a portion of its lower German court judgment by means of a suit against I.N.C. in the United States District Court at Norfolk. That suit recited the German judgment and claimed from I.N.C. the sum of $150,000 (this representing the $64,018.83 judgment amount plus interest since 1960 and German costs). Using Rule 9(h) Federal Rules of Civil Procedure and Rule B, Supplemental Rules For Certain Admiralty & Maritime Claims, Zack secured the attachment of

the vessel VIRTUS as other property of I.N.C. for the attempted dual purpose of obtaining jurisdiction over that non-resident corporation and security for the German judgment.

I.N.C. contested the right of the United States District Court to hear Zack's claim, asserting lack of a personal German judgment and of admiralty jurisdiction as well as other defenses.

District Judge Kellam dismissed Zack's suit because:

(1) No personal judgment had been awarded Zack against I.N.C. by the German court.

(2) A money judgment (if one existed) could not be enforced in admiralty.

(3) Zack's suit upon the original cargo damage claim was barred by the one year statute of limitations. 46 USCA §1303(6).

(4) The doctrines of res judicata and estoppel by judgment prohibited Zack from maintaining its action again.

(5) An erroneous German judgment must be corrected in Germany, not in an American court.

(6) Having elected to proceed in a German court which exercised jurisdiction, Zack could not now proceed in an American court on the same cause of action.

The United States Court of Appeals for the Fourth Circuit affirmed, holding that the German lower court had limited I.N.C.'s liability to its

interest in the vessel SEVERN RIVER. It described the German judgment as essentially and substantively "--an in rem judgment against the SEVERN RIVER, imposing no in personam liability upon its owner, and furnishing no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International.--."

Thereafter, the German appellate court's judgment became known. It affirmed Zack's personal judgment against charterer and charterer's partners but reduced the principal amount awarded from $64,018.83 to $33,000. It dismissed Zack's suit against I.N.C. as being time-barred under German law (the law selected in the bill of lading).

Zack made this German appellate decision known to the United States Court of Appeals for the Fourth Circuit in a timely Petition for Rehearing. That Court modified somewhat the language of its original opinion but again affirmed the dismissal below, treating the Zack cause of action there "--as being founded solely on the (lower court) German judgment."

ARGUMENT

Zack should not be granted a writ since no conflicting decisions of courts of appeal are claimed, no new question of Federal law is presented, and since the Court of Appeals did not so far depart from accepted and usual judicial proceedings as to call for the intervention by the United States Supreme Court. Also the matter has become moot.

The issues here interest Zack and I.N.C. but no one else. They concern an interpretation of the lower German court judgment and of Zack's right thereunder, if any, to collect money damages from I.N.C. They

reflect Zack's last minute effort to shift from enforcement of the lower German court judgment (as Zack had interpreted that judgment) and to now pursue through this suit its original cargo claim more than 15 years after the damage occurred.

1. NO NEW FEDERAL QUESTION IS PRESENTED.

The wrong sought to be vindicated by Zack in the United States District Court was a failure by I.N.C. to pay the money judgment allegedly rendered against it by the lower German court. The cause of action to enforce any judgment is a new creature, the underlying facts having become merged in the judicial declaration. Provident Sav. Life Assur. Soc. v. Ford (U.S. 1885) 114 U.S. 635; Walker v. Powers (U.S. 1881) 104 U.S. 245; Hodges v. Snyder (U.S. 1922) 261 U.S. 600; Somportex, Ltd. v. Philadelphia Chewing Gum Corp. (3rd Cir. 1971) 453 F.2d 435.

Though American admiralty courts have enforced the in rem decrees (judgments) of foreign admiralty judges this has been allowed only when further in rem admiralty proceedings were available. Penhallow, et al v. Doane's Adurs. (U.S. 1795) 3 Dallas 54; Otis v. The Rio Grande (CC La. 1872) Fed. Cas. No. 10,613, affd 23 Wall (90 U.S.) 458; Beale, The Conflict of Laws, Vol. 2 page 1426; Gilmore & Black, The Law of Admiralty, 2nd Edition, §9-85.

A personal money judgment, however, will not be enforced in admiralty. Ramsey v. Allegre (U.S. 1827) 12 Wheat. (25 U.S.) 611 (holding that after a debt arising from a maritime contract to furnish supplies and labor to a vessel is changed into a

note, the debt in its new form (the note) cannot be enforced by the use of admiralty process).

That Zack sought to enforce a personal money judgment against I.N.C. by use of admiralty process is completely clear from the record. For example, in his Affidavit Brief of August 28, 1973, directed to the District Court, Zack's counsel stated that "--. Plaintiff seeks to enforce that (German) judgment by the suit in the Court. Incidental to enforcement plaintiff seeks to amend said judgment to obtain the redress it is entitled to according to American law, which the German court refused to apply.--" (4th Circuit Appendix, Page A 145, Mr. Cataldo).

Zack's first question on its appeal from the District Court dismissal described its suit as "--this admiralty suit to enforce a decree of a court in Hamburg, Germany in favor of plaintiff for cargo damage,--."

And in its present petition addressed to this Court, Zack says that "--. The (vessel) owner did not file any security pending its appeal and plaintiff (Zack) never agreed to stay execution against it but sought to enforce the (German) judgment.--" (Page 8, Statement of The Case - Zack's Petition).

2. INTERVENTION BY THIS COURT IS NOT REQUIRED.

The District Court dismissed Zack's suit, holding that the German judgment was unenforceable against I.N.C. in admiralty. But that court also treated Zack's suit as an original cargo damage

claim, held that it could not now be pursued by Zack for a number of reasons including the running of the statute of limitations. 46 USCA §1303(6).

Thus, nothing would be now gained by honoring Zack's request to treat its suit as founded on the original cause of action rather than on its German judgment.

For a cargo damage suit must be commenced in the United States within one year after the delivery of the goods or the date when the goods should have been delivered. 46 USCA §1303(6). Such a suit clause extinguishes the cause of action itself and not merely the remedy. Midstate Horticultural Co., Inc. v. Pennsylvania Railroad Co. (U.S. 1943) 320 U.S. 356; M.V.M., Inc. v. St. Paul Fire & Marine Insurance Co. (D.C. N.Y. 1957) 156 F.Supp. 879, rev'd other grounds 258 F.2d 374.

In addition Zack's bill of lading #35 set forth a similar one year limitation period for suit. And such bill (Clause 21) recites further that "--. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear."

This contract provision reciting when suit is deemed to have been brought has been the subject of several recent cases. The conclusions reached were that such filing of a cargo suit within one year after delivery is not sufficient, that service of process must likewise be accomplished in that period or the suit fails. Empacadora Puertorriquena DeCarnes, Inc. v. Alterman Transport Line, Inc.,et al

(D.C. Puerto Rico 1969) 303 F.Supp. 474; The Atlantic Companies v. Gulf Puerto Rico Lines, Inc. (D.C. Puerto Rico 1972) 355 F.Supp. 172.

And the fact that a timely suit may have been filed in one district but not served does not save an identical but untimely suit later filed and served in another district. Hugo Stinnes Steel & Metals Co. v. Oldendorff, et al (D.C. Ga. 1974) 372 F.Supp. 705.

Thus, under no theory can Zack successfully contend that any cargo damage suit it may have timely filed but did not serve in New York in 1960-61 can toll the one year statute of limitations and negate the suit limitations of the bill of lading Clause 21 so as to make timely any identical cargo action it filed in Virginia in 1972, eleven years later.

This is not to say Zack may not return to the courts of New York where it claims to have cargo damage suits already on file and attempt to pursue I.N.C. there provided it can first get proper service of process. Certainly the Court of Appeals went to some pains to leave this avenue available if Zack wished to try to follow it.

But it is difficult to follow what Zack wishes to accomplish by all this. Zack now has a money judgment for its cargo loss in Germany against the charterer as well as security there for that judgment's payment in full plus interest and costs. So further litigation here or elsewhere against I.N.C. even if successful will avail Zack nothing. For Zack clearly cannot collect twice for its same loss. Hence, it does not need this Court's help to be made whole. Zack will be whole any time it sees fit to accept payment of its German judgment against charterer now affirmed there on appeal.

3. THE MATTER HAS BECOME MOOT.

Zack suggests that instead of affirming the decision below the Circuit Court of Appeals should have remanded the matter to the District Court with instructions.

Had the District Court enforced the lower German court judgment against I.N.C., and had the German appellate court ruling then become known pending the American appeal outcome, the Circuit Court of Appeals could properly have remanded with instructions to dismiss. The cases cited by Zack suggest that this would have been appropriate.

But the District Court dismissed the suit initially and the Circuit Court of Appeals affirmed. Hence, nothing would have been accomplished by a remand.

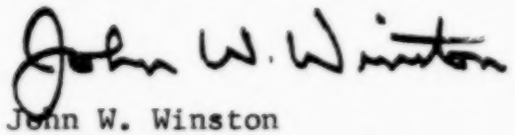
In any event, this Court lacks jurisdiction to review moot cases, no case or controversy existing. S.E.C. v. Medical Committee for Human Rights (U.S. 1972) 404 U.S. 577. In view of the German appellate court ruling Zack has no German judgment to enforce against I.N.C. on any basis. Hence, further discussion of that judgment has become moot.

CONCLUSION

For the reasons stated above it is respecfully submitted that this Court is without jurisdiction to grant petitioner any relief (the matter

now being moot) and that in any event the matter does not justify this Court's attention and consideration. Zack's Petition for a Writ should therefore be denied.

Respectfully submitted,



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